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No. 85-5404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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In re Matthews, 46 Or. App. 757, 613 P.2d 88 (1980), *cert. denied*, 450 U.S. 1040 (1981) 18
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Jurek v. Texas, 428 U.S. 262 (1976) 23
Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 22
Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court), *remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957, *reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976) 19
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McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) 13
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Ill. Rev. Stat. ch. 91½, § 3	19

Other Authorities:

Abel, *et al.*, "An Integrated Treatment Program for Rapists," in *Clinical Aspects of the Rapist* (R. Rada, ed., 1978)	18
American Correctional Association, *Directory of Juvenile and Adult Correctional Agencies* (1984)	14
American Psychiatric Association, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (1985)	24

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American Psychiatric Association Task Force Report, *Clinical Aspects of the Violent Individual* (1974) 14

Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983) 19

Berlin & Meinecke, *Treatment of Sexual Offenders With Antiandrogenic Medications*, 138 Amer. J. Psychiat. 601 (1981) 18

Dix, "Special Dispositional Alternatives for Abnormal Offenders," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 11, 12

Favole, "Mental Disability in the American Criminal Process," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 10, 11, 12

J. Goldstein, *et al., Criminal Law: Theory and Process* (1974) 15

Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiat. 669 (1977) 20

Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders* (1950) 11

Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30's to the 80's* (1977) 8, 10, 11, 16-17

Guttman, *MSDO Law: The Assumption Challenged*, 4 Crim. Justice J. 75 (1980) 23

S. Halleck, *Psychiatry and the Dilemmas of Crime* (1967) 15

J. Monahan, *The Clinical Prediction of Violent Behavior* (1981) 14

Monahan & Davis, "Mentally Disordered Sex Offenders," in *Mentally Disordered Offenders* (J. Monahan & H. Steadman, eds., 1983) 14

Money, *et al.*, "Combined Antiandrogenic and Counselling Programs for Treatment of 46, XY and 47, XYY Sex Offenders," in E. Sacher, *Hormones, Behavior, and Psychopathology* (1976) 18

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Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders "Not Guilty by Reason of Insanity" and Criminal Sex Psychopaths*, 57 J. Crim. L., Criminology & Police Science (1966).. 17-18

Ransley, *Repeal of the Wisconsin Sex Crimes Act*, 1980 Wisc. L. Rev. 941 12

Resnick & Wolfgang, "New Directions in the Treatment of Sex Deviance," in *Sexual Behaviors: Social, Clinical, and Legal* Aspects (Resnick & Wolfgang, eds., 1972) 17

J. Robitscher, *The Powers of Psychiatry* (1981).... 15

Steadman, *et al.*, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 Law and Human Behavior 31 (1982) 12

Stromberg, "Developments Concerning the Legal Criteria for Civil Commitment: Who Are We Looking For?" in *Psychiatry 1982: Annual Review* (L. Grinspoon, ed., 1982) 19

Sturgeon & Taylor, *Report of a Five-Year Follow-up Study of Mentally Disordered Sex Offenders from Atascadero State Hospital in 1973*, 4 Crim. Justice J. of Western State Univ. 31 (1980) 17

Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 Amer. J. Sociology 142 (1950) 10

Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology & Police Science 215 (1960) 10

Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health (1978) 11-12

U.S. Dep't of Justice, *Bureau of Justice Statistics: Prison Admissions and Releases, 1982* (1985).... 14

Van Duizend, *et al.*, *An Overview of State Involuntary Civil Commitment Statutes*, 8 Mental Disability Law Reporter 328 (May-June, 1984).. 20

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INTEREST OF AMICUS CURIAE

The American Psychiatric Association ("APA"), founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000 psychiatrists are members. The Association has participated as amicus curiae in numerous cases involving psychiatric issues, including *Smith v. Sielaff* (No. 85-5487), *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985), *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Mills v. Rogers*, 457 U.S.

291 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

In recent years, the APA has been actively involved in examining the role of psychiatrists as expert witnesses and consultants in both criminal cases and civil commitment proceedings. It has focussed specifically on the role of psychiatrists in predicting future dangerousness in a variety of legal contexts as well as on the extent to which confidentiality and other traditional protections generally afforded by psychiatrists are appropriate in these contexts. The instant case involves sexually dangerous persons proceedings, which historically have been thought to embody elements of criminal proceedings and elements of civil commitment proceedings. Based on its prior work, the APA believes that it can make an important contribution to the Court's consideration of the issues presented here. In addition, because psychiatrists have the principal responsibility for providing testimony in sexually dangerous persons proceedings, as well as for treating those who are adjudicated to be sexually dangerous, the resolution of this case is likely to affect the work of the APA's members.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

STATEMENT

Petitioner Terry B. Allen was charged on October 14, 1982, with having committed the crimes of unlawful restraint and deviate sexual assault. On November 5, 1982, the state petitioned to have Allen declared a sexually dangerous person under the Sexually Dangerous Persons Act. Ill. Rev. Stat. ch. 38, § 105-1.01 *et seq.* (1981).[1] The crim-

[1] Section 1.01 of that statute provides:

> All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year

inal charges were subsequently dismissed at a preliminary hearing for lack of probable cause. Allen was then recharged by indictment, after which the petition to declare him sexually dangerous was reinstated.

Pursuant to the sexually dangerous persons statute, Allen, while in custody, was ordered to submit to two psychiatric examinations. The trial on the petition was then held on March 4, 1983. Dr. Colen, the first psychiatrist to testify, stated that he had interviewed Allen for 45 minutes to an hour on November 11, 1982.[2] Asked about the evaluation process, he said that he "[t]alked with [Allen] about the offense surrounding the alleged charge, some historical information, did a mental status evaluation, and then came to some conclusions and dictated that in a report." (Tr. 9.)[3] Dr. Colen concluded that Allen was a sexually dangerous person and that he had "criminal propensities to commit sex crimes." (Tr. 28.)[4] He acknowledged that these opinions were "primarily" based on Allen's statements. (Tr. 21, 43-44.)

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immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

[2] In his report of that date, Dr. Colen summarized Allen's statements regarding both the assault that led to the instant proceedings and his prior sexual assaults. The report also quoted Allen as saying, "it was against her will, I couldn't control myself," and "I have done this before."

[3] Transcript citations are to the original trial court transcript of the sexually dangerous person proceeding.

[4] While the court sustained the objections of Allen's attorney to testimony by the psychiatrists as to the content of the statements made by Allen during the psychiatric examinations, it nevertheless permitted the psychiatrists to state their conclusions as to whether Allen was a sexually dangerous person even though those opinions were based largely on what Allen told the psychiatrists. (Tr. 14-15, 23-25.)

Dr. Mortimer Beck, the other psychiatrist to have examined Allen, also testified that he had a propensity for committing sexual assaults. Dr. Beck's opinion was based on (1) Allen's statements that there had been more than one such incident, (2) Allen's failure to receive treatment, and (3) Allen's statement that he could not stop himself. (Tr. 58.)[5] Dr. Beck further indicated that his conclusion that Allen suffered from a mental disorder rested largely on Allen's own statements about his past history and condition. (Tr. 62.) Based on the testimony of the psychiatrists, as well as that of the victim concerning Allen's sexual assault of her,[6] the trial court found Allen to be a sexually dangerous person. He was then committed to the Department of Corrections for an indeterminate period of time.

The Illinois Court of Appeals for the Third District reversed on the ground that Allen's privilege against self-incrimination had been violated by the use of psychiatric testimony based on his unwarned statements. *People v. Allen*, 123 Ill. App.3d 669 (1984). Finding this Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981), to be "directly applicable," the intermediate appellate court held that "the trial court could not rely solely on the defendant's unwarned statements to the psychiatrists to find the defendant a sexually dangerous person." 123 Ill. App.3d at 671.[7]

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[5] Dr. Beck's report of his November 12, 1982, examination stated that Allen had "admitted to the incident alleged" and that he had discussed other sexual assaults that he had committed.

[6] According to the victim, Allen surreptitiously entered her car, and ultimately simulated intercourse with her and forced her to perform fellatio on him. (Tr. 76-80.)

[7] The Court of Appeals interpreted the Sexually Dangerous Persons Act to require specific proof of more than one act of sexual assault. Starting from this predicate, it concluded that the state had relied on the psychiatrists to make its entire case because the victim had only testified about one act. Thereafter, the Illinois Supreme Court interpreted the Act to require proof of only one act, and

The Illinois Supreme Court reversed the decision of the Court of Appeals. It held that the privilege against self-incrimination was not available in sexually dangerous person proceedings because they are "essentially civil in nature," the aim of the statute being to provide "treatment, not punishment." Pet. App. 4, 5. The court also found support for its ruling in this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying the factors set out there for evaluating a procedural due process claim, the court concluded, "[s]ince the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability, the *Eldridge* test totally supports [our] holdng . . . that due process does not require the application of the privilege." Pet. App. 7.

SUMMARY OF ARGUMENT

The basic issue presented by this case is whether the Fifth Amendment privilege against self-incrimination applies to a proceeding under the Illinois Sexually Dangerous Persons Act. In our view, the Court should answer this question in the affirmative, recognizing that such proceedings are substantially equivalent to criminal proceedings and significantly different from civil commitment proceedings, to which the privilege does not, and should not, apply.

1. Established principles make clear that the application of the Fifth Amendment privilege depends on the substance of the state proceedings, and not on any civil or criminal label that might attach to them. *See In re Gault*, 387 U.S. 1 (1967); *Estelle v. Smith*, 451 U.S. 454 (1981). In Illinois—as in other states that have similar laws—the purpose, nature and effects of a sexually dan-

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concluded that the victim's testimony was sufficient to satisfy this criterion in the instant case. Pet. App. 9-10.

gerous person adjudication all demonstrate that these proceedings are fundamentally punitive in substance. While they focus in part on a person's mental condition, they also depend explicitly on proof of a serious criminal act. *See* Pet. App. 9. In recognition of this fact, sexually dangerous person proceedings in Illinois are generally subject to the same procedural requirements as is a criminal trial, including a right to a jury trial, Ill. Rev. Stat. ch. 38, § 105.5 (1981), and a requirement of proof beyond a reasonable doubt. *Id.* at § 105-3.01. The result of being adjudicated a sex offender, moreover, is confinement—usually for several years and potentially for life—in a setting that has most if not all of the punitive and security aspects that characterize a prison.

2. Although psychiatric treatment is supposedly provided to those who are confined as sexually dangerous, that fact alone does not alter the basic criminal nature of these proceedings. There is reason to question not only the availability of such treatment, but also its effectiveness in remedying the sexually dangerous propensities of many offenders. Moreover, even when treatment is provided, the overall nature of the confinement still remains largely punitive, much as a delinquency adjudication or criminal sentence does despite the availability of rehabilitative and treatment programs. In this regard, sexually dangerous person proceedings are significantly different from civil commitment proceedings, as to which the vast majority of courts have held that the self-incrimination privilege does not apply. In civil commitment, the state acts primarily in a benevolent capacity to provide treatment to persons who have committed no crime. *See Addington v. Texas*, 441 U.S. 418 (1979). The hospitals to which such persons are sent are typically not punitive in design, and people are generally hospitalized for reasonably brief periods, during which time effective treatment usually can be, and often is, provided.

3. Reliance by the court below on the principles of *Mathews v. Eldridge*, *supra*, to find that the Fifth Amendment privilege should not apply was misguided. Those principles were designed for assessing due process claims in administrative proceedings, and have not been, nor should they be, used for evaluating a claim to a specific constitutional protection like the privilege against self-incrimination. In particular, *Eldridge's* concerns with the reliability of the proceedings and the government's ability to prove its case are simply inadequate to protect the different interests served by the privilege. *See In re Gault*, *supra*. It is also worth noting that, contrary to the view of the Illinois Supreme Court, application of the privilege need not thwart the state's legitimate interests in confining and treating sexually dangerous offenders.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SHOULD APPLY TO PROCEEDINGS UNDER THE ILLINOIS SEXUALLY DANGEROUS PERSONS ACT BECAUSE THEY ARE ESSENTIALLY CRIMINAL IN NATURE AND EFFECT.

The Fifth Amendment privilege against self-incrimination requires that when a state seeks "to punish an individual [it must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citations omitted). "[T]he privilege," as this Court has explained, "reflects the limits of the individual's attornment to the state and —in a philosophical sense—insists upon the equality of the individual and the state." *In re Gault*, 387 U.S. 1, 47 (1967). The Illinois Supreme Court believed that, by attaching the label "civil" to proceedings under its Sexually Dangerous Persons Act, the state could ignore this basic protection and thereby compel a defendant to provide information that can lead to his indefinite confine-

ment. This Court has made clear, however, that, for Fifth Amendment purposes, it is inappropriate to "disregard substance because of the feeble enticement of the 'civil' label-of-convenience" attached to a proceeding. *Id.* at 50. Instead, the proper inquiry for determining when the privilege applies requires an assessment of "the nature of the statement or admission and the exposure which it invites." *Id.* at 49.

There can be no doubt, as an initial matter, that "the nature of the statement[s] or admission[s]" elicited during a court-ordered psychiatric evaluation under the Illinois statute are within the compass of the Fifth Amendment's protection. The basis for the psychiatrists' adverse conclusions about petitioner—much as in *Estelle v. Smith*, *supra*, 451 U.S. at 463-65 & n.8—rested expressly on the substance and content of his statements and admissions. *See* pp. 3-4 *supra*. Indeed, psychiatric opinions in sexually dangerous person (or "sex psychopath") proceedings, *even on the question of mental illness*, often rely, to an unparalleled degree, on an individual's admission of sexual offenses. *See* Group for the Advancement of Psychiatry, *Psychiatry and Sex Psychopath Legislation: The 30's to the 80's* 866 (1977) ("[t]he circularity of this relationship [between the offense and a person's mental state] is repeatedly demonstrated by identifying the special sex offender on the basis of minimal evidence of psychopathology and instead inferring mental illness from the act itself.") (hereinafter cited as "GAP Report").

The only open issue in this case, therefore, is whether the "exposure" that a person faces on the basis of his compelled admissions in a sex psychopath case is sufficiently criminal to warrant application of the Fifth Amendment privilege. That question, in turn, can be answered by looking at the purpose and nature of sex psychopath proceedings, and, most significantly, at the con-

sequences that result from being adjudicated a sexually dangerous person. *See In re Gault, supra*, 387 U.S. at 47-51; *Estelle v. Smith, supra*, 451 U.S. at 462-63. Viewed in those terms, it is clear that the privilege should apply in proceedings like the one at issue here.[8]

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[8] The Illinois statute requires proof of 3 separate criteria: (1) mental disorder for more than a year; (2) criminal propensities to commit future sex offenses; and (3) the commission of at least one act of or attempt at sexual assault or molestation. Ill. Rev. Stat. ch. 38, § 105-1.01 (1981). *See* Pet. App. 9. The Illinois Supreme Court did not explicitly decide whether testimony based on a compelled psychiatric examination could be used to prove the third criterion since the victim's testimony was found adequate for this purpose in the present case. Pet. App. 9-10. The court did, however, make clear that "[i]t would have been proper to allow into evidence both the statements [made by Allen to the psychiatrists] themselves and the psychiatrists' conclusions based thereon." Pet. App. 8. Since those statements included information about the specific sexual assault committed by petitioner, *see* notes 2 & 5 *supra*, it appears that psychiatric testimony would be admissible with respect to all three statutory criteria. *See also* Pet. App. 8 ("defendants must answer all questions at such [psychiatric] examinations regardless of the possible incriminatory nature of the answers.").

Even assuming that psychiatric testimony were limited to the first two criteria, however, we nevertheless believe that the privilege should still apply since all of the criteria must be proved before a defendant can be confined under the statute. Indeed, even in a *post-conviction* sex psychopath proceeding, imposition of the sanction depends on "a new finding of fact that was not an ingredient of the offense charged." *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (citation omitted). Thus, much as in *Estelle v. Smith, supra*, 451 U.S. at 463 & n.6—where the Court expressly noted that, under Texas law, psychiatric testimony based on a compelled examination could not be used to prove the crime, but only to prove the elements necessary for imposing a capital sentence—the privilege should apply whenever a defendant's statements are used to establish an essential element of the state's proof, whether it effects "guilt" in the narrow sense or, more broadly, a special "punitive disposition"—like an indeterminate sentence—that is potentially more severe than the penalty that otherwise would attach to the crime in question.

A. Sexually Dangerous Person Statutes Expose Offenders To Consequences That Are Similar To, And Potentially More Severe Than, Those That Follow A Criminal Conviction.

Special statutes for dealing with sexually dangerous persons were first enacted in this country in the late 1930's. *See, e.g., Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). Today, approximately one-third of the states have such laws.[9] Although these statutes vary somewhat as to criteria and procedures,[10] their common genesis and purpose is clear: "Anxiety about sexual crimes, particularly those having violent overtones or involving children, often created the atmosphere for the passage of such legislation. The primary goal of public protection from threatening sexual behavior remained." GAP Report at 853. *See also* Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 Amer. J. Sociology 142 (1950). Historically, the heart of these statutes was their provision for indefinite confinement; they appeased the public demand for special protection against sex offenders with the promise that such people would be incarcerated until "cured." *See* GAP Report at 865, 867.[11]

If anything, the argument for the privilege is, in one respect, stronger here than in *Estelle v. Smith*, and than it would be in a case like *Specht v. Patterson*, since the guilt and dispositional questions are simultaneously determined in a single proceeding.

[9] As of January 1, 1980, 20 states had such statutes in effect. This is a declining number, however. *See* Favole, "Mental Disability in the American Criminal Process," in *Mentally Disordered Offenders* 270 (J. Monahan & H. Steadman, eds., 1983).

[10] A state-by-state description of the basic standards and procedures embodied in the various sex psychopath laws as of 1980 is contained in Favole, *supra* note 9, at 269-81. *See also* Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. Crim. L., Criminology & Police Science 215 (1960).

[11] Most statutes still provide for indeterminate confinement. Although Oregon amended its law to limit the initial confinement to the term of the sentence for the crime committed by a sex offender,

Consistent with their criminal focus, sex psychopath laws are limited in application to people who have already engaged in sexual misconduct. *See* Favole, *supra* note 9, at 270-81. In the large majority of states, such a proceeding can be instituted only after conviction for a sexual offense, although the type of crime necessary to trigger these statutes varies. *See* Dix, *supra* note 11, at 138. While the Illinois procedure may be invoked when a defendant is merely *charged* with a crime, the application of the statute nevertheless requires proof of the commission of a serious sex offense—an actual or attempted sexual assault or molestation—during the sexually dangerous person trial itself. *See* Pet. App. 9.

Although developed as an adjunct to the criminal law, sex psychopath dispositions initially were often considered potentially more humane and more effective than traditional sentences because they held out the promise of treatment and cure, as well as a period of confinement that was tailored to the individual needs of the defendant. *See, e.g.*, Group for the Advancement of Psychiatry, *Psychiatrically Deviated Sex Offenders* (1950). In more recent years, however, there has been an increasing recognition that the noble goals of these statutes simply have not been realized. For example, the Group for the Advancement of Psychiatry in its 1977 report concluded: "First and foremost, sex psychopath and sex offender statutes can best be described as approaches that have failed." GAP Report at 935. Similarly, the Task Panel on Legal and Ethical Issues of the President's Commission on

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that period of confinement can be extended subject to further review procedures. *See* Dix, "Special Dispositional Alternatives for Abnormal Offenders," in *Mentally Disordered Offenders* 144-46 (J. Monahan & H. Steadman, eds., 1983). California had a similar procedure, but its sex psychopath law was repealed in 1982. *See id.* at 188. *See also State v. McCarter*, 91 Wash.2d 249, 588 P.2d 745 (1978) (state must prove continuing dangerousness if sex psychopath seeks review of confinement after expiration of maximum sentence).

Mental Health 132 (1978), urged that "[l]aws authorizing the involuntary confinement of sexual psychopaths . . . should be repealed." Between 1978 and 1982, eight states did in fact repeal such laws. *See* Favole, *supra* note 9, at 270. *See also* Ransley, *Repeal of the Wisconsin Sex Crimes Act*, 1980 Wisc. L. Rev. 941.[12]

The judicial response to these statutes has undergone a somewhat analogous evolution. Beginning with what might fairly be characterized as a "wait and see" attitude, *see Minnesota ex rel. Pearson v. Probate Court*, *supra*, 309 U.S. at 276-77, the Court in later years has adopted a more demanding approach. *See Specht v. Patterson*, 386 U.S. 605 (1967) (significant procedural due process required for a post-conviction sex psychopath disposition); *Humphrey v. Cady*, 405 U.S. 504 (1972) (equal protection challenge regarding absence of jury trial deemed substantial). The lower federal courts and the state courts have gone even further, frequently imposing procedural requirements typically associated with criminal cases. *See generally* Dix, *supra* note 11, at 166-75. In Illinois, "[f]or example, in addition to statutory rights to a hearing, jury trial and counsel, a defendant is entitled to the right to confront and cross-examine witnesses, . . . and the right to a speedy trial." *U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 935 (7th Cir. 1975) (citations omitted). And, as *Stachulak* itself held, the state must also satisfy the criminal law burden of proof beyond a reasonable doubt. *See also People v. Pembrock*,

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[12] The most recent data available indicate that in 1978 approximately 2500 people nationwide were then being confined pursuant to special sex offender laws; twelve hundred people were actually committed in 1978 itself. *See* Steadman, *et al.*, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 Law and Human Behavior 31 (1982). In Illinois, approximately 25 people are currently confined under the Sexually Dangerous Persons Act.

62 Ill.2d 317, 342 N.E.2d 18 (1976), codified at Ill. Rev. Stat. ch. 38, § 105-3.01 (1981).[13]

These increasing demands for procedural rigor reflect the fact that the consequences suffered by someone who is adjudicated a sex psychopath are essentially criminal in nature. As this Court observed in *Specht v. Patterson, supra*, when considering Colorado's sex psychopath statute, "[t]he punishment under the . . . Act is *criminal punishment* even though it is designed not so much as retribution as it is to keep individuals from inflicting further harm." 386 U.S. at 608-09. (emphasis supplied). No less can be said of the Illinois statute at issue here.

After being adjudicated as sexually dangerous, a person is committed to the Department of Corrections to be confined indefinitely. Ill. Rev. Stat. ch. 38, § 105-8 (1981). Thus, he faces a potential loss of liberty that may well exceed the maximum sentence for even the most serious sex crime.[14] Moreover, there is no requirement in Illinois for any periodic review of a sexually dangerous person's confinement. Rather, he remains confined "until he can prove that he is no longer sexually dangerous," *United States*

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[13] There has been relatively little litigation on the self-incrimination question presented here. While essentially the same issue was raised in this Court under Maryland's defective delinquent statute, the case was decided on another ground. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972). The state courts have divided on this issue. *Compare People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942), and *Commonwealth v. Barboza*, 387 Mass. 105, 438 N.E.2d 106, *cert. denied*, 459 U.S. 1020 (1982) (privilege does not apply), *with Haskett v. State*, 255 Ind. 206, 263 N.E. 2d 529 (1970) (privilege applies).

[14] In *United States ex rel. Stachulak v. Coughlin, supra*, for example, the defendant was charged with indecent solicitation of a child, a crime carrying a maximum penalty of one year imprisonment. He was adjudicated under the Illinois sexually dangerous persons statute, however, and, at the time of the Court of Appeals decision, had already served five years. 520 F.2d at 936 n.4.

ex rel. Stachulak v. Coughlin, *supra*, 520 F.2d at 936,[15] or he may be conditionally released, much like a prisoner who is placed on parole. Ill. Rev. Stat. ch. 38, § 105-10 (1981). And, while there is little available data on the length of time that sex psychopaths actually serve, a recent study suggests that in 1978 the *average* time nationally was just over two years. *See* Monahan & Davis, "Mentally Disordered Sex Offenders," in *Mentally Disordered Offenders* 193 (J. Monahan & H. Steadman, eds., 1983). By comparison, the *median* time served by all criminals released from state prisons during the years 1977-1982 was, depending on the year of release, between 16 and 19 months; even those who had been convicted for rape served *median* sentences during the same time period of between 32 months and 3 years. *See* U.S. Dep't of Justice, *Bureau of Justice Statistics: Prison Admissions and Releases, 1982*, at p. 8, Table 13 (1985).

This lengthy period of confinement for sex psychopaths, moreover, is served in a facility that is usually characterized by the same kind of security and punitive qualities that mark a prison setting. In Illinois, for example, sexually dangerous persons are sent to Menard Psychiatric Center—a special "hospital" for the "criminally insane" —where they are housed in single-occupancy, maximum security cells. *See* American Correctional Association, *Directory of Juvenile and Adult Correctional Agencies*, at Ill. 115 (1984). These special facilities are frequently very restrictive of individual liberty and, in certain respects, may provide their residents with even fewer rights

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[15] This is not an easy matter to prove. *See Barefoot v. Estelle*, 103 S. Ct. 3383, 3406 (1983) (Blackmun, J., dissenting). Not only is it difficult to predict dangerousness (or non-dangerousness) with any reasonable degree of accuracy, it is also true that there is a general tendency to overpredict dangerousness because of the consequences of an erroneous prediction of non-dangerousness. *See* APA Task Force Report, *Clinical Aspects of the Violent Individual* 25 (1974); J. Monahan, *The Clinical Prediction of Violent Behavior* 86 (1981).

and protections than does a prison. *See generally* J. Goldstein, *et al.*, *Criminal Law: Theory and Process* 270-71 (1974) (comparing conditions and restrictions at a Massachusetts hospital for the criminally insane with those at a state prison). In any event, it is clear that the nature of confinement in such a facility is typically more like confinement in a prison than in a mental hospital. *See* J. Robitscher, *The Powers of Psychiatry* 76 (1981); S. Halleck, *Psychiatry and the Dilemmas of Crime* 249-51 (1967).

Finally, the stigma resulting from being adjudicated a sexually dangerous person is particularly serious. "Unlike . . . delinquency proceedings [to which the privilege nevertheless applies, *see In re Gault, supra*], these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency." *U.S. ex rel. Stachulak v. Coughlin, supra*, 520 F.2d at 936. Indeed, an adjudication as a sexually dangerous person effectively stigmatizes a person as both criminal and mentally ill—or "bad" and "mad," to put it in the vernacular. *See also In re Andrews*, 334 N.E.2d 15 (Mass. 1975) ("a person adjudicated a [mentally disordered sex offender] receives a stigma at least as great as that flowing from a criminal conviction").

In sum, the "exposure" faced by a defendant in a sexually dangerous person proceeding is, in a real sense, similar to, if not more severe than, that faced by a criminal defendant.[16] The sole distinction relied on by the Illi-

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[16] This exposure is also significantly different from that posed by a parole or probation revocation hearing, to which the privilege against self-incrimination has been held not to apply. *See Minnesota v. Murphy*, 104 S. Ct. 1136, 1147 n.7 (1984). In contrast to confinement as a sexually dangerous person, parole or probation "arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every individual is entitled, but only of the conditional liberty properly dependent on observance of special

nois Supreme Court to avoid this conclusion was that "[a] person found to be sexually dangerous is to receive 'care and treatment . . . designed to effect recovery.'" Pet. App. 5, quoting Ill. Rev. Stat. ch. 38, § 105-8 (1981). We now turn to a consideration of that factor.

B. The Provision Of Treatment To Those Committed Under Sexually Dangerous Persons Statutes Does Not Provide An Adequate Justification For Abrogating The Fifth Amendment Privilege.

Although the provision of appropriate treatment to sexually dangerous people is certainly a laudatory goal, it is not a sufficient basis for eliminating the privilege against self-incrimination in sex psychopath cases. This Court rejected similar arguments in *Gault*, concluding that the privilege was applicable despite the rehabilitative focus of delinquency proceedings. 387 U.S. at 14-30. Likewise, there is no doubt that the provision of high quality programs for adult offenders would not permit the state to withdraw Fifth Amendment protections or other rights from those it seeks to criminally charge and convict. In other words, so long as a sanction remains essentially punitive, the state is not allowed to choose between providing treatment and respecting an individual's constitutional rights; it may not be constitutionally required to do the former, but in no event is it excused from observing the latter. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 585-87 (Burger, C.J., concurring).

It is also important to recognize that there is good reason to doubt whether treatment is actually being provided to many sex psychopaths. According to the Group for the Advancement of Psychiatry, while the amount of treatment varies in different locales, the fact is that "[c]onfinement in a hospital as a sexual psychopath may

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parole [or probation] restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). *See also Gagnon v. Scarpelli*, 411 U.S. 778, 781-83 (1973).

lead to no more therapy than a criminal receives in a prison." GAP Report at 926; *see id.* at 857-59. As the Seventh Circuit said in a case involving the Illinois statute, "[a]ll too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehouse operation for social misfits." *U.S. ex rel. Stachulak v. Coughlin*, *supra*, 520 F.2d at 936, quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

Even when treatment is made available, there may be reason to question its efficacy for sex offenders. Unlike many mentally ill people, for whom significant treatment potential exists, sex offenders have proven to be a highly treatment resistant group. One reason for this distinction is that many sex offenders, having been diagnosed as mentally ill on the basis of their sexual offenses, *see* p. 8 *supra*, lack "significant pathology such as psychosis, retardation, or major affective disorders." Sturgeon & Taylor, *Report of a Five-Year Follow-up Study of Mentally Disordered Sex Offenders from Atascadero State Hospital in 1973*, 4 Crim. Justice J. of Western State Univ. 31, 42 (1980). Traditional psychiatric treatments, however, are usually most effective when such pathology is present. In addition, the term sex psychopath (or sexually dangerous person) has been used to describe a broad spectrum of behaviors and disorders. *See* GAP Report at 840-41. Undifferentiated efforts to treat everyone who falls within such imprecise borders—an all too frequent approach, especially in the past—are almost certain to be unsuccessful.[17]

We should also point out, however, that, in recent years, developments with respect to the treatment of sexually

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[17] Thus, studies from the not-so-distant past indicate little difference in the recidivism rate between treated and untreated sex offenders. *See* Resnick & Wolfgang, "New Directions in the Treatment of Sex Deviance," in *Sexual Behaviors: Social, Clinical, and Legal Aspects* 397 *et seq.* (H. Resnick & M. Wolfgang, eds., 1972); Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders*

dangerous people have been more encouraging. *See, e.g.*, Money, *et al.*, "Combined Antiandrogenic and Counselling Programs for Treatment of 46, XY and 47, XYY Sex Offenders," in E. Sacher, *Hormones, Behavior, and Psychopathology* 105 (1976); Berlin & Meinecke, *Treatment of Sexual Offenders With Antiandrogenic Medications*, 138 Amer. J. Psychiat. 601 (1981); Abel, *et al.*, "An Integrated Treatment Program for Rapists," in R. Rada, *Clinical Aspects of the Rapist* 161 (1978). Nevertheless, despite these positive developments, the overall efficacy of treatment for most sex offenders is, in our view, still not sufficiently well established to provide an adequate basis for converting the essentially punitive effects of a sex psychopath disposition into a benevolent governmental endeavor.

In support of its contrary view, the Illinois Supreme Court cited several cases involving the application of the privilege to *civil commitment* proceedings.[18] While it is true that this Court, by way of summary affirmance, *see French v. Blackburn*, 443 U.S. 901 (1979), as well as the great majority of other courts, has rejected the privilege in the civil commitment context,[19] the assumed comparabil-

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"Not Guilty by Reason of Insanity" and Criminal Sex Psychopaths, 57 J. Crim. L., Criminology & Police Science 31 (1966).

[18] *See* Pet. App. 5-6, citing *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd summarily*, 443 U.S. 901 (1979); *Cramer v. Tyars*, 23 Cal. 3d 131, 588 P.2d 793 (1979); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *In re Matthews*, 46 Or. App. 757, 613 P.2d 88 (1980), *cert. denied*, 450 U..S 1040 (1981).

[19] In addition to the cases cited in note 18, *supra*, *see also In re Helvenston*, 658 S.W.2d 99 (Tenn. App. 1983); *In re Winstead*, 425 N.E.2d 943 (Ohio App. 1980); *In re Feld*, 412 A.2d 1032 (N.H. 1980); *State ex rel. Kiritsis v. Marion Probate Court*, 381 N.E.2d 1245 (Ind. 1978); *State v. O'Neil*, 545 P.2d 97 (Or. 1976); *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764 (Pa. Super. 1975), *cert. denied*, 424 U.S. 960 (1976). *Contra, Tyars v. Finner*, 518

ity of these two types of proceedings is unwarranted for several reasons.[20]

To begin with, civil commitment statutes are designed to serve a very different purpose from that served by sex psychopath statutes. In no state is proof of a criminal act ever a prerequisite to civil commitment. To the contrary, every state authorizes commitment solely on the ground that a person is mentally ill and dangerous to self. *See* Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983). While the states also allow commitment for those who are mentally ill and dangerous to others, even then the scope of "dangerousness" is by no means limited to the commission of criminal acts.[21]

F. Supp. 502 (C.D. Cal. 1981); *Suzuki v. Quisensberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court), *remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957, *reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1974).

[20] Ironically, in Illinois, by statute, the privilege *does* apply to civil commitment proceedings. Ill. Rev. Stat. ch. 91½, § 3-208. While we think that such a result is certainly not constitutionally compelled, we nevertheless fail to see how Illinois can justify the use of the privilege in the non-punitive situation presented by civil commitment without extending it to sex psychopath cases. *See Humphrey v. Cady*, *supra*, 405 U.S. at 509-512 (substantial equal protection claim raised when jury trial is provided for civil commitment but not for sex psychopath proceeding).

[21] In most states, proof of dangerousness rests solely on a prediction of future behavior. *See* Beis, *State Involuntary Commitment Statutes*, 7 Mental Disability Law Reporter 358 (July-August, 1983). In a few states, there is also an "overt act" requirement. *See ibid.* But even in those states, the kind of act, attempt or threat that has been found sufficient for commitment typically is far broader than the kind of behavior that is required for a criminal conviction. *See* Stromberg, "Developments Concerning the Legal Criteria for Civil Commitment: Who Are We Looking For?" in *Psychiatry 1982: Annual Review* 343 (L. Grinspoon, ed., 1982).

Moreover, the actual deprivation of liberty imposed on a committed patient is considerably different from that faced by a sexually dangerous person. Virtually all civil commitment statutes require periodic reviews, where the state has to prove anew that the criteria for commitment are still being met. *See* Van Duizend, *et al.*, *An Overview of State Involuntary Civil Commitment Statutes*, 8 Mental Disability Law Reporter 328, 335 (May-June, 1984). Due to these procedures, as well as the fact that most civil committees suffer from mental illnesses that are usually amenable to traditional forms of treatment, *see* Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiat. 669 (1977), the average period of hospitalization for civilly committed patients is less than a month.[22] This relatively short period of confinement contrasts sharply with the 2-year average period of confinement experienced by sex psychopaths. *See* p. 14 *supra*. Similarly, the facilities to which civil committees are sent typically allow patients considerable liberty within the hospital, and are invariably far less security-oriented and punitive than hospitals for the criminally insane. *See* pp. 14-15 *supra*.[23]

A meaningful comparison between civil commitment proceedings and sex psychopath proceedings, therefore,

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[22] This figure is based on an unpublished study by the National Institute of Mental Health. According to the Institute, in 1980—the last year for which data are available—civilly committed patients averaged 25 days in state and county hospitals, 14 days in private psychiatric hospitals and 10 days in general hospitals.

[23] Although there is, unfortunately, still some stigma associated with involuntary hospitalization for treatment of a mental illness, this Court has previously pointed out that "[t]he pattern of untreated, abnormal behavior—even if nondangerous—arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder." *Parham v. J.R.*, 442 U.S. 584, 601 (1979).

leads to a different conclusion from the one reached by the court below. The plain fact is, as this Court has acknowledged, "[i]n a civil commitment, state power is *not* exercised in a punitive way." *Addington v. Texas*, 441 U.S. 418, 428 (1979) (emphasis added). For that basic reason, the Fifth Amendment privilege would then stand only as an impediment to the state's ability to effectuate its essentially benevolent goals. *Cf. Estelle v. Smith*, *supra*, 451 U.S. at 465 (privilege does not apply to compelled psychiatric examination for purpose of assessing competency to stand trial). The relevant considerations in sex psychopath proceedings point in the opposite direction.

C. The Court Below Mistakenly Relied On *Mathews v. Eldridge*, 424 U.S. 319 (1976), In Deciding Whether The Privilege Against Self-Incrimination Should Apply To A Sexually Dangerous Person Proceeding.

The Illinois Supreme Court also found support for its constitutional ruling by invoking the multi-factored due process analysis articulated in *Mathews v. Eldridge*, *supra*, 424 U.S. at 334. In particular, the court emphasized two aspects of the *Eldridge* test in rejecting the privilege: (1) "[t]he privilege against self-incrimination would add little more reliability to the proceedings"; and (2) the state's "substantial interest in treating as well as protecting the public from sexually dangerous persons . . . would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings." Pet. App. 6-7. In our view, the court's reliance on *Eldridge* was misplaced and, in any event, its conclusion about the effect of the privilege on the state's legitimate interests is greatly exaggerated.

The *Eldridge* test was designed to determine whether a particular set of "administrative procedures . . . are constitutionally sufficient." 424 U.S. at 334. Such an inquiry, of course, is bottomed on the recognition that "[d]ue process is flexible and calls for such procedural

protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). That same flexibility, however, is not appropriate when determining the applicability of an express constitutional protection like the Fifth Amendment privilege. On the contrary, the privilege was specifically intended to protect interests that go beyond those identified in the *Eldridge* test. "[T]he privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *In re Gault*, *supra*, 387 U.S. at 47 (citations omitted). *See also Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

In view of this acknowledged purpose, application of the privilege invariably makes it more difficult for the state to impose penal sanctions. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) ("We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need."). Thus, by looking to *Eldridge*, the Illinois court focussed on the wrong set of relevant interests. Indeed, if the *Eldridge* test were applied to a traditional criminal prosecution, the very same considerations relied on by the court below would lead to a ruling that abrogated the privilege in those circumstances as well.

Although the Illinois Supreme Court's reliance on *Eldridge* was mistaken, we nevertheless think it is appropriate to point out that the court significantly exaggerated the effect of applying the privilege on the state's legitimate interests under a sexually dangerous persons statute—*i.e.*, "treating as well as protecting the public from sexually dangerous persons." Pet. App. 7. Several meaningful options would remain available to the

state. If the defendant exercises his Fifth Amendment privilege, and the state believes that, as a result, it will be unable to prove all the elements of sexual dangerousness, it can still prosecute for the underlying criminal offense. Once the defendant has been properly convicted and sentenced, needed treatment can then be provided in prison or through a transfer to a treatment facility, such as the one in which Allen is being held. *See Vitek v. Jones*, 445 U.S. 480 (1980).

In addition, despite application of the privilege, there will still be many instances when it is possible to proceed under a sex psychopath statute. The defendant may, with appropriate safeguards, waive the privilege if he views such a disposition as preferable to a criminal prosecution, either because he seeks treatment or for other reasons.[24] And even if the defendant is not willing to waive the privilege, it may be possible to prove the requisite criteria through a combination of third-party testimony about the defendant's actions as well as his social and medical history, and predictive statistical and actuarial information. *Cf. Jurek v. Texas*, 428 U.S. 262, 272-73 (1976); *Barefoot v. Estelle*, 103 S. Ct. 3383, 3399-4000 (1983).[25]

In sum, to paraphrase this Court's statement when faced with a similar claim about the effect of applying the privilege (and other protections) to juvenile proceedings, such requirements "will not compel the States to abandon or displace any of the substantive benefits

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[24] The experience under the California "Mentally Disordered Sex Offender" law, for example, indicated that sex psychopath dispositions had become fully integrated into the plea bargaining process because defendants believed that such a commitment would be of shorter duration than a felony sentence. *See* Guttman, *MDSO Law: The Assumption Challenged*, 4 Crim. Justice J. 75 (1980).

[25] It may also be appropriate to require that the defendant submit to a compelled psychiatric examination when he seeks to admit psychiatric testimony in an effort to rebut the state's proof in a sexually dangerous person proceeding. *See Estelle v. Smith, supra*, 451 U.S. at 465.

of the [sexually dangerous persons] process." *In re Gault*, *supra*, 387 U.S. at 21. Rather, the application of the privilege against self-incrimination in the circumstances presented here will simply mean that a defendant cannot be confined indefinitely in a prison-like setting on the basis of his own statements.[26]

CONCLUSION

For the foregoing reasons, the Court should rule that the Fifth Amendment privilege against self-incrimination applies to proceedings under the Illinois Sexually Dangerous Persons Act.

Respectfully submitted,

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[26] If the Fifth Amendment privilege applies to proceedings under the Illinois Sexually Dangerous Persons Act, it is clear that it was violated in this case. *See Estelle v. Smith*, *supra*, 451 U.S. at 466-69. There, the Court held that, when the privilege applies to a court-ordered psychiatric examination of a defendant who is in custody, the defendant must be advised that "he has a right to remain silent" and that "anything said can be used against the individual in court." 451 U.S. at 467, quoting *Miranda v. Arizona*, 384 U.S. 436, 467-69 (1966). We note also that the ethical standards of the psychiatric profession require an examining psychiatrist to give such warnings before conducting any examination to which the usual rules of confidentiality do not apply. *See* APA *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, Section 3, Annotation 6 (1985). Apparently only one of the psychiatrists who examined Allen gave any warning at all. *See* November 12, 1982 report of Dr. Mortimer D. Beck to court. Even that warning was insufficient for constitutional purposes since it only advised the defendant that the results of the examination would be reported to the court.